Grimson v. I.N.S.N.D.Ill.,1995.Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.
Allan Stuart GRIMSON, a/k/a, Stu Grimson, Plaintiff,
v.
IMMIGRATION AND NATURALIZATION SERVICE and Doris Meissner, Defendants.
No. 94 C 5243.

March 27, 1995.

MEMORANDUM OPINION AND ORDER
GETTLEMAN, District Judge.
*1 Plaintiff Allan Stuart Grimson, a citizen of Canada, has filed a complaint for declaratory and injunctive relief pursuant to 28 U.S.C. § § 2201, 1361 seeking to overturn the defendant Immigration and Naturalization Service's ("INS") denial of plaintiff's visa petition. Both parties have moved for summary judgment pursuant to Fed.R.Civ.P. 56. For the reasons set forth below, both motions are denied and the case is remanded for further evidentiary findings.

BACKGROUND

Plaintiff is a citizen of Canada who has been a professional hockey player since the 1982-83 season, when he began playing for the World Hockey League team at Regina, Saskatchewan. He has been playing in the National Hockey League ("NHL") since the 1988-89 season.

On January 20, 1993, plaintiff filed a visa petition with defendant INS, seeking classification as a priority worker of extraordinary ability pursuant to 8 U.S.C. § 1153(b)(1)(A). That petition was denied by the director of the INS Northern Service Center, who found that plaintiff had failed to demonstrate that he was a player of extraordinary ability as defined by the INS. Plaintiff appealed to the Administrative Appeals Unit of the INS ("AAU") contending that he had achieved sustained national and international acclaim as a professional hockey player, that the Northern Service Center had recently classified four other hockey players of comparable ability as aliens of extraordinary ability, and that denial of his petition was based on an erroneous interpretation of the applicable statute and regulations.

On May 28, 1993, the AAU affirmed the denial of plaintiff's petition, holding that "[w]hile the record indicates that the petitioner had played several seasons with an NHL team, it has not been established that the petitioner has achieved the sustained national or international acclaim required for classification as an alien with extraordinary ability, that he is one of that small percentage who have risen to the very top of his field of endeavor, or that his entry into the United States will substantially benefit prospectively the United States."

Plaintiff then filed an action in this court pursuant to 28 U.S.C. § § 2201 and 1361 (case No. 93 C 3354) for declaratory and injunctive relief with respect to the INS's denial of his visa petition. In a Memorandum Opinion and Order dated September 9, 1993, Judge Kocoras, to whom that case was assigned, found that the interests of justice required a remand back to the INS for further evidentiary proceedings. Specifically, Judge Kocoras concluded that

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remand would allow plaintiff to take into consideration the INS's statutory interpretation of extraordinary ability when submitting further documentary evidence. In addition, Judge Kocoras also concluded that the INS's argument that it need not compare plaintiff's petition to those of other hockey players who had been granted visas by INS pursuant to the same statute "not only lacked merit but borders on the specious." Id. at 7. Judge Kocoras concluded that how the INS treated others in the field, particularly those alleged to possess no greater skill than petitioner, was highly relevant under the statutory scheme.

*2 On remand, plaintiff's petition was once again denied by the director of the Northern Service Center. That decision was again affirmed by the AAU. Plaintiff then filed the present action seeking declaratory and injunctive relief.

STANDARD OF REVIEW

This court's review in this case is limited to the determination of whether the INS's denial of plaintiff's visa petition constituted an abuse of discretion. The test for abuse of discretion in an immigration case is as follows:

The decision must be upheld unless it was made without a rational explanation, inexplicably departs from established policies, or rests on an impermissible basis such as invidious discrimination against a particular race or group.

Bal v. Moyer, 883 F.2d 45, 47 (7th Cir.1989) (citing Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir.1985)). Factual findings which underlie the exercise of discretion are to be tested under the substantial evidence test. Patel v. INS, 811 F.2d 377, 382 (7th Cir.1987). It is pursuant to these standards of review that the court analyzes the cross-motions for summary judgment.

DISCUSSION

As in plaintiff's previous case, this case turns on the interpretation of "extraordinary ability" as used in the priority worker category under 8 U.S.C. § 1153(b)(1)(A)(i), which provides:

(b) Preference allocation for employment-based immigrants

Aliens subject to the worldwide level specified in section 1151(d) of this title for employment-based immigrants in a fiscal year shall be allotted visas as follows:

(1) Priority workers

Visas shall first be made available in a number not to exceed 28.6 percent of such worldwide level, plus any visas not required for the classes specified in paragraphs (4) and (5), to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (c):

(A) Aliens with extraordinary ability
An alien is described in this subparagraph if-

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation.

The statute itself does not define extraordinary ability; however, the regulations promulgated by the INS define the term as "a level of expertise indicating

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that the individual is one of that small percentage who has risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). A petition for relief under this section must be accompanied by evidence that the alien has "sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). The regulations set forth various types of evidence that may be submitted to meet this evidentiary burden, including the documentation of memberships and associations which require outstanding achievements, major media publications relating to the alien's work in the field at issue, and evidence that the alien has commanded a large salary in relation to others in the field. 8 C.F.R. § 204.5(h)(3)(i-y).

*3 Under the INS's statutory interpretation of extraordinary ability, membership on a major league athletic team by itself, does not automatically qualify an alien for approval of his petition. Judge Kocoras found this interpretation to be reasonable, and the parties do not now argue otherwise. Plaintiff does argue, however, that sustained membership for a number of years on a major league athletic team should be enough to demonstrate extraordinary ability. The INS disagrees, contending that every case must be analyzed separately.

To support his petition, plaintiff submitted numerous articles from major newspapers and magazines describing his abilities and style of play. In addition, he submitted his salary for comparison to other players in the field, evidence indicating that he was invited to the 1993 NHL all-star skills competition on the basis that he had one of the hardest shots in the league, as well as the applications of three other hockey players of (plaintiff claims) comparable ability who have been granted visas based on their extraordinary ability.

In affirming the denial of plaintiff's petition for the second time, the AAU completely rejected all of his submissions. It first found that plaintiff's salary ($300,000) was below the average NHL salary, and therefore did not qualify as a high salary in the field of endeavor. This, of course, presupposes that plaintiff's field of endeavor is as an NHL player (which plaintiff disputes) as opposed to a hockey player in general or even a professional hockey player. In any event, it is not reasonable simply to compare plaintiff's salary to the average NHL salary, without any indication of how that average is determined. Obviously, the superstars of the NHL make tremendously high salaries, and that can skew any average. This court does not believe (and INS has not argued) that only superstars can qualify as having extraordinary ability.

The AAU did compare plaintiff's salary to those of the three other players submitted by plaintiff, and found his to be significantly lower.FN1 This is really no indication, however, that plaintiff does not receive a high salary for what he does compared to others who do the same thing. A better method would be to compare plaintiff's salary to those individuals in the NHL who play his position and serve the same role to the team as plaintiff serves.

The AAU also rejected all of the articles written about plaintiff, because they discussed his physical toughness and physical ability as opposed to his technical hockey skills. It repeatedly quotes only those portions of the articles which indicate plaintiff's role as a fighter or enforcer, and repeatedly emphasizes that plaintiff does not score a lot of goals. Indeed, in reviewing an

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article submitted by plaintiff, the AAU completely ignored those portions indicating that plaintiff had been invited to join the 1993 skills competition, focusing instead solely on the portion of the article indicating that it was likely that plaintiff would never be invited to the all-star game itself.FN2 Plaintiff has never suggested that he is a goal scorer, or that all of his technical skills are as great as some others in the league. He has, however, submitted evidence that he has one of the hardest shots in the league, which must be considered a technical hockey skill. Moreover, this court sees no reason to reject out of hand plaintiff's primary asset (his toughness) as a hockey skill or ability. Perhaps unfortunately (for the game, if not for the fans), professional hockey has become more of a contact sport than an ice skating contest.

*4 The court needs no citation to authority to recognize that hockey is a tough, physical game.FN3 There are twenty-six teams in the NHL, and it is likely that each has a player who fills the role that plaintiff fills. Perhaps plaintiff is the best in the league at what he does. If so he might be the best in the world. Perhaps he is only mediocre. Either way, he is probably one of the top twenty-six players in the world at what he does. There is simply no evidence in the record to support a finding either way.

The interests of equity would best be served by a remand for further evidentiary findings consistent with this opinion. On remand, plaintiff is directed to submit evidence regarding the necessity of a player with his style of play and abilities, and evidence comparing his skill, salary level and other abilities to those of comparable players in the NHL, players who fulfill the same role for their respective teams. Defendant is directed to consider plaintiff's argument that a sustained career in the NHL demonstrates extraordinary ability. As the record stands now, this court would be compelled to conclude that defendant's decision to reject out of hand plaintiff's particular abilities as a hockey player, as well as his having a sustained career in the NHL based on those abilities, was an abuse of discretion.

CONCLUSION

The court remands this case in accordance with this opinion.

FN1. When it comes to artistic or athletic ability, the INS appears to be skating on thin ice by placing inordinate weight on comparative salaries, which may vary with a number of factors other than pure athletic ability (e.g. the financial condition of the team, movement of players within the league, and the current availability of other players with the alien's particular attributes).

FN2. If true, this could mean, at most, that there might be one or two players better than plaintiff in the entire NHL. This would not support a conclusion that plaintiff, who might be number two or three in the league did not possess extraordinary ability.

FN3. The court notes that only a month ago, one headline in the Chicago Tribune sports section was, “Hawks trade for some muscle.” Chicago Tribune, February 23, 1995.
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Not Reported in F.Supp., 1995 WL 134755 (N.D.Ill.)

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